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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JOSE ALBERTO REYES, JR., et al., Defendants and Appellants.	B201294 (Los Angeles County Super. Ct. No. BA273621)

APPEAL from judgments of the Superior Court of Los Angeles County, David Wesley, Judge. Affirmed.

Charlotte E. Costan, under appointment by the Court of Appeal, for Defendant and Appellant, Jose Albert Reyes.

H. Clay Jacke, II, for Defendant and Appellant, Miriam Ahamad.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Victoria B. Wilson and Michael R. Johnson, Deputy Attorneys General, for Plaintiff and Respondent.

*Pursuant to California Rules of Court, rule 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts III (B)-(E).

I. INTRODUCTION

Defendants, Jose Albert Reyes, Jr. and Miriam Ahamad, appeal from their convictions. Mr. Reyes was convicted of first degree murder (Pen. Code,[1] § 187, subd. (a)). As to Mr. Reyes, the jury found that a principal personally discharged a firearm which caused death. (§ 12022.53, subds. (b), (c), (d), (e)(1).) Ms. Ahamad was convicted of being an accessory after the fact. (§ 32.) As to both defendants, the jury also found their offenses were committed for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1)(A).) Mr. Reyes argues the trial court improperly denied his severance motion and admitted testimony from two Los Angeles Police Department experienced gang investigators. Mr. Reyes further argues there was insufficient evidence to support his conviction. Ms. Ahamad argues the trial court improperly found she did not have standing to move to suppress wiretap evidence and there was insufficient evidence the murder was committed for the benefit of a criminal street gang. We affirm.

II. FACTUAL BACKGROUND

We view the evidence in a light most favorable to the judgment. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Elliot* (2005) 37 Cal.4th 453, 466; *Taylor v. Stainer* (9th Cir. 1994) 31 F.3d 907, 908-909.) On May 31, 2004, Jose Martinez-Martinez, Marco Antonio Larrainzar, and Ray Chester met. They met in order to celebrate Mr. Chester's birthday. The three men went to a restaurant on Sixth Street in downtown Los Angeles, where they drank beer for approximately one hour. While at the restaurant, three men, who appeared to be Salvadorian or Guatemalan, told Mr. Martinez they hated Mexicans. Mr. Martinez and his companions left the restaurant. Thereafter, they went to El Pulgarcito restaurant on Vermont Avenue. The three men ordered bottled beer. Mr. Martinez left the restaurant briefly to watch a basketball game in an adjacent establishment. Later, Mr. Martinez rejoined his two companions at the same table.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

Approximately five Latin men were seated at another table in the restaurant. Mr. Reyes looked angrily at Mr. Chester more than seven times.

At some point, Mr. Larrainzar got up to play music and Mr. Martinez went to the restroom. A man in the restroom spoke to Mr. Martinez in Spanish. While in the restroom, Mr. Martinez was asked where he was from. Mr. Martinez responded that he was from Mexico. The individual said that he was from Guatemala. Mr. Martinez walked back to the restaurant. Mr. Martinez was confronted by another man in the hallway. The man asked Mr. Martinez: "Where are you from? If you're not going to tell me, I'm going to kill you." Mr. Martinez responded: "No, just go away. We're just celebrating my friend's birthday. What's going on?" The man said: "No, I'm not - - I'm not joking. Just tell me where you're from or I'm going to kill you."

Mr. Chester became concerned when Mr. Martinez did not immediately return from the restroom. Mr. Chester walked up the steps to the hallway. Mr. Chester approached Mr. Martinez. Mr. Chester asked the man: "Hey, what happened? What's wrong with you? We're just celebrating my birthday." The man asked Mr. Chester, "What barrio, what hood are you from?" Mr. Chester responded, "From none." The man then punched Mr. Chester in the face. Mr. Chester fell down a nearby flight of stairs. Mr. Martinez was struck on the left side of the face by another person. Mr. Martinez was assaulted while being held from behind. Mr. Martinez feared that he was going to be killed. Both assailants were Latino.

Mr. Martinez and Mr. Chester then heard a gunshot. Mr. Chester then felt people jump over his body as several individuals ran out of the restaurant. Mr. Chester saw Mr. Martinez come from the kitchen. Mr. Chester and Mr. Martinez then found Mr. Larrainzar on the floor. Mr. Larrainzar was bleeding from the head. Mr. Martinez and Mr. Chester went outside to attempt to locate their assailants. However, it was dark and they saw no one. Thereafter, Mr. Chester and Mr. Martinez left the restaurant. Mr. Larrainzar later died as a result of a close contact gunshot wound to his head.

Nelly Weld was working as a waitress at the El Pulgarcito restaurant on May 31, 2004. At approximately 8 p.m., three Latino men entered the restaurant and sat at a middle table. The men ordered beer. Ten or fifteen minutes later, another four Latino men walked into the restaurant. The men sat at two tables near the window. Ms. Weld had never seen any of the men in either group before. They also ordered beer. Ms. Weld noticed that one of the men seated at the middle table had a spider web tattoo on his elbow and a bald head. Ms. Weld associated these features with gangs. Ms. Weld was familiar with that fact there was a local gang in the area of the restaurant. Ms. Weld was the only waitress in the restaurant and an individual identified only as "Maritza" was the cook on May 31, 2004.

At some point, Ms. Weld went to the storage room to get beer for the cooler. While inside the storage room, Ms. Weld heard a gunshot. When Ms. Weld heard a commotion from the area leading to the restroom, she entered the kitchen. Ms. Weld and the cook looked through the small window of the kitchen door. Ms. Weld then looked into the restaurant. Ms. Weld saw people leaving the restaurant. Ms. Weld saw the backs of the individuals who had been seated near the window as they went out the front door. Ms. Weld saw a wounded man inside the restaurant. Ms. Weld called the owner, Zoila Valdez, who was at another restaurant. At trial, Ms. Weld did not recall telling Ms. Valdez that two gang members, who were known by certain gang nicknames, shot someone in the restaurant. Ms. Weld did not recall telling Ms. Valdez that these men were the same gang members that had been "hanging out" at the restaurant for two weeks and causing problems. After speaking with Ms. Valdez, Ms. Weld then called the police. Ms. Weld locked the front door of the restaurant. Before the police arrived, Ms. Weld removed the beer bottles from the tables and placed them in the trash can.

Detective Mario Mota met with Ms. Valdez, the restaurant owner, at approximately 12:30 a.m. on June 1, 2004. Ms. Valdez had telephoned the police about the shooting. Ms. Valdez had received a telephone call from Ms. Weld about the shooting. Ms. Weld said gang members had shot someone. Only Ms. Weld and the cook

were present at the time of the shooting. Ms. Weld explained to Ms. Valdez the victim and a friend had come to the restaurant and began drinking and eating. This was the first time Ms. Weld had seen these individuals. Thereafter, two gang members had entered the restaurant and waited for the victim to go to the restroom. Ms. Weld then heard a gunshot. Ms. Weld also told Ms. Valdez the same gang members had gone to the restaurant for the past two weeks. Ms. Weld stated that Mr. Reyes and Mr. Aguilar were the individuals who had waited for the victim near the restroom. However, Ms. Weld used Mr. Reyes' and Mr. Aguilar's gang monikers in describing them to Ms. Valdez. Ms. Valdez knew both individuals and described them to Detective Mota. Ms. Valdez described Mr. Reyes utilizing three possible gang nicknames and said he lived directly across the street from the restaurant on Alvarado Boulevard. Ms. Valdez was very nervous, trembling, and reluctant to give information to Detective Mota. Ms. Valdez explained that she did not want to get involved because it was very dangerous to give out such information.

On a later date, Detective Mota interviewed Ms. Valdez again. Their discussion was tape recorded. Ms. Valdez indicated that she did not want to be involved in the trial because she had been intimidated. However, she wrote down on a piece of paper two names. Mr. Reyes and Mr. Aguilar were known by the aliases supplied by Ms. Valdez. Ms. Valdez passed the piece of paper to Detective Mota on the counter and then took it back and crumpled it. At first, Ms. Valdez refused to look at photographic lineups containing photographs of the suspects. However, when Detective Mota placed them on the counter, she pointed at Mr. Reyes' photo. Ms. Valdez then went to the kitchen where she was seen shaking, crying, and wiping tears from her eyes. Detective Mota encouraged Ms. Valdez to look at the photographic lineup containing Mr. Aguilar's picture. However, Ms. Valdez ran into the bathroom and locked the door.

When Detective Mota had interviewed Ms. Weld at the scene, she indicated the victims looked like "normal guys." However, she identified the other three individuals as

those involved in the shooting. Ms. Weld stated that they were frequent customers or at least that she had seen them before.

Los Angeles Police Department Detective Jeff Breuer arrived at the homicide scene at approximately 11:45 p.m. Detective Breuer saw a Honda Accord and a 2004 Chevrolet Tahoe truck parked on the street and two Corona beer bottles on the sidewalk near the restaurant entrance. Once inside, Detective Breuer saw all the tables but one had apparently been cleared. One table was broken. Detective Breuer understood that the restaurant had been open when the shooting occurred and numerous customers had been inside. Inside a bucket, Detective Breuer found 14 Corona beer bottles, a few of which were full. Detective Breuer believed that someone had started to clean up the restaurant after the shooting. The kitchen was also clean. One expended bullet casing was found in the restaurant. At approximately 3 a.m., Detective Breuer learned that Ms. Ahamad, who was accompanied by two children, had requested access to a Chevrolet Tahoe. Department of Motor Vehicles records showed the Chevrolet Tahoe was registered to Mr. Aguilar on Normandie Avenue, which is approximately two miles from the El Pulgarcito restaurant.

At approximately 11 a.m. on June 1, 2004, Drug Enforcement Administration Special Agent Scott Wight contacted Detective Breuer. Agent Wight had obtained a federal court order to intercept and monitor Mr. Aguilar's mobile telephone. In the early morning hours of June 1, 2004, the authorities intercepted incoming and outgoing conversations on Mr. Aguilar's mobile phone which discussed a Los Angeles homicide. The substance of the intercepted conversations involved the restaurant shooting. The authorities continued to monitor Mr. Aguilar's mobile phone. Agent Wight provided information to Detective Breuer regarding the user of the phone. Agent Wight also provided information as to who Mr. Aguilar spoke to and the content of their conversations. The intercepted conversations were recorded on a compact disk, preserved, and transcribed for future use. A stipulation was read to the jurors that limited

the application of the recording to Ms. Ahamad. A redacted copy of the recorded conversations was played at trial. A redacted transcript was provided for the jurors' use.

When Mr. Aguilar spoke with Ms. Ahamad, he mentioned that he left an empty cardboard six-pack in the restaurant. An empty Corona beer six-pack was found in the restaurant by Detective Breuer. Nineteen monitored calls between Mr. Aguilar and Ms. Ahamad were made between 9:41 a.m. and 3:38 p.m. Ms. Ahamad and Mr. Aguilar discussed: the shooting at El Pulgarcito; the victim's death; witnesses; possible identifications; and the fact that Ms. Ahamad was able to drive away with the Chevrolet Tahoe. Ms. Ahamad discussed arrangements for Mr. Aguilar to get false identification and $15,000. In addition, Ms. Ahamad admitted having someone speak to Ms. Weld. Ms. Ahamad was able to find out what Ms. Weld told the police. Ms. Ahamad later told Mr. Aguilar about a discussion with Ms. Weld. Ms. Weld indicated that she had not revealed the identification of anyone to the police and would not do so in the future. Ms. Ahamad informed Mr. Aguilar that Ms. Weld was shown a photo album and took empty beer bottles at the murder scene had been thrown in the trash.

Ms. Ahamad made arrangements to meet Mr. Aguilar at a Walgreen's drug store parking lot at Sixth Street and Vermont Avenue to give him some clothes. Ms. Ahamad told Mr. Aguilar: "But I'm going to tell you something. Since it was a gang thing they're going to start looking for cholos and you know that Blackie and all those guys are snitches, Raul. All they have to do is say your nickname and everything goes to shit."

The police watched an apartment building on Westlake Avenue where Ms. Ahamad resided. Agent Wight had given information to the police officers regarding that address. The police knew that Ms. Ahamad and Mr. Aguilar lived together. The police also watched a residence on South Alvarado, where Mr. Reyes's wife, Yatsmin Aguilar Reyes, resided. Ms. Reyes was Mr. Aguilar's sister. At approximately 12:45 p.m. on June 1, 2004, Officer Lance Jurado observed Ms. Ahamad get out of a silver Honda registered to Ms. Aguilar and Mr. Reyes. At approximately 3 p.m. Officer Jurado saw Ms. Ahamad walk out of the apartment building, enter a silver Honda, and drive away.

Immediately thereafter, the silver Honda registered to Ms. Aguilar and Mr. Reyes appeared behind the first car and followed them. Yatsmin Aguilar was driving the second car.

Lieutenant Peter Zarcone followed the two silver Hondas in the direction of Sixth Street and Vermont Avenue. Lieutenant Zarcone had learned that this neighborhood was to be a meeting point with Mr. Aguilar. Lieutenant Zarcone drove a different route to the area across from the drug store parking lot at that intersection. Detective Breuer was notified at approximately 3:30 p.m. on June 1, 2004, that the location of Sixth Street and Vermont Avenue was to be monitored. Lieutenant Zarcone saw Mr. Aguilar drive into the parking lot in a black Nissan. Mr. Aguilar stopped his car in a parking space. One of the Hondas parked adjacent to Mr. Aguilar. The occupant of the Honda spoke briefly with Mr. Aguilar. The three cars then drove out of the parking lot. Mr. Aguilar drove out of the parking lot and was arrested shortly thereafter.

At approximately 6:20 p.m. on June 1, 2004, Ms. Ahamad telephoned Detective Mota. Ms. Ahamad asked Detective Mota if she could bring her son to see Mr. Aguilar for the last time. Mr. Aguilar was Ms. Ahamad's son's father. When asked why she would assume that they would not see Mr. Aguilar again, Ms. Ahamad responded that she just "knows those things." Detective Mota told Ms. Ahamad that Mr. Aguilar would soon be released. Mr. Aguilar was released at approximately an hour later. Mr. Aguilar's mobile telephone was returned to him. Police officers hoped to get more information from conversation on the monitored phone.

On June 7, 2004, Mr. Martinez met with Detective Mota. Mr. Martinez gave a description of the three men who confronted him in the restaurant bathroom and hallway. Mr. Martinez was shown a photographic lineup by Detective Mota. Mr. Martinez selected Mr. Aguilar as looking like the individual in the bathroom. Mr. Martinez was shown another photographic lineup some time later. Mr. Martinez identified Mr. Reyes as the second individual. Mr. Martinez also identified Mr. Reyes at trial. Mr. Martinez was 90 percent certain of the identification of Mr. Reyes.

Mr. Chester was also interviewed by Detective Mota. Mr. Chester was shown a photographic lineup. As noted, Mr. Chester was asked where he was from and was punched. Mr. Chester selected Mr. Aguilar from the photographic lineup. Mr. Chester was 90 percent certain about his identification. Mr. Chester met with Detective Mota on June 10, 2004 and was shown another photographic lineup. Mr. Chester identified Mr. Reyes as one of the assailants. Detective Mota described Mr. Chester's comments while reviewing the photographic lineup, "He basically told me that number 4 . . . he definitely recalled seeing him inside the restaurant, seated to his right across from him . . . staring at him and giving him dirty looks while he was in that restaurant." Mr. Reyes' picture was in position No. 4 in the photographic lineup.

Roy Sandt was homeless and often lived in his car behind the El Pulgarcito restaurant in 2004. Mr. Sandt often emptied the trash for the restaurant between 8:30 and 10 p.m. In return, the restaurant owner, Ms. Valdez, would save bottles and cans for him to recycle. On May 31, 2004, Mr. Sandt saw the cook at the back door of the restaurant. She was very distraught and on the verge of crying. Mr. Sandt stepped inside, where he saw Ms. Weld in the dining room on the other side of the kitchen pass through window. Ms. Weld looked "like she was freaking out" in Mr. Standt's words. Mr. Sandt decided to leave.

On July 13, 2004, Mr. Sandt spoke to Detective Julian Pere about the incident. Detective Pere wrote down the information provided by Mr. Sandt. Detective Pere had Mr. Sandt read and sign the statement. Mr. Sandt identified Mr. Aguilar and Mr. Reyes utilizing their gang monikers. Mr. Sandt described Mr. Aguilar as a white man over six feet tall with dark hair and a stocky build and goatee. Mr. Sandt said Mr. Aguilar drove a white sport utility truck which frequented the area of Seventh and Alvarado Streets. At trial, Mr. Sandt recalled identifying Mr. Aguilar to Detective Pere. However, at trial, Mr. Sandt did not recall a specific gang moniker which appeared on the piece of paper to which he affixed his signature. Mr. Sandt identified Mr. Aguilar from a photographic lineup. But, as always, Mr. Sandt utilized Mr Aguilar's gang moniker. Mr. Sandt also

identified Mr. Reyes as the person using a specific gang moniker from another photographic display. Detective Pere contacted Mr. Sandt by telephone on a later date regarding testifying in this case. Mr. Sandt said he would be killed if he testified regarding the information in his signed statement.

Mr. Reyes was arrested on November 6, 2004. Ms. Ahamad was arrested on November 19, 2004. Ms. Ahamad was carrying $1,823 in cash at that time. Mr. Aguilar was arrested in Oakland, California on September 22, 2005. At the time of his arrest, Mr. Aguilar had several forms of identification depicting his photograph. But the name on the papers was Carlos Ramirez. Mr. Aguilar died before trial commenced.

Lieutenant Zarcone was assigned to the criminal street gang unit in the early 1990's with specific responsibility for the local gang to which defendants belonged. Thereafter, he supervised three gang units. Lieutenant Zarcone monitored the local gang closely and arrested many of its members. Lieutenant Zarcone had spoken to Mr. Reyes on four or five occasions. Lieutenant Zarcone knew Mr. Reyes to be a member of the local gang. Lieutenant Zarcone was aware that Mr. Reyes's four brothers were all members of the local gang. Lieutenant Zarcone knew a local gang member who is Mr. Reyes's younger brother. Mr. Reyes's girlfriend, Ms. Aguilar, is Mr. Aguilar's sister. Ms. Ahamad was also a member of the local gang. Ms. Ahamad lived with Mr. Aguilar. During the 1990's there were quite a few women involved in the local gang.

Officer Danny Arrona had been assigned to the gang unit for four and one-half years at the time of trial. Officer Arrona had grown up in an area known for gangs. Officer Arrona was familiar with gang hangouts, rivalries, tattoos, graffiti, and vandalism. Officer Arrona had hundreds of conversations with gang members and attended national gang conferences. Officer Arrona had previously testified in court regarding the local gang in this case. In 2004, the local gang dominated in the MacArthur Park area. There were 120 to 140 members in the gang at that time. The local gang had symbols and signs to identify membership which were used in graffiti. Individuals joined the gang by being "jumped in" or by committing a violent act or

crime. Most gang members are in the gang for life, unless they moved away forever or were "jumped out." Gang members often have visible tattoos that serve to intimidate others in the neighborhood. Both Ms. Ahamad and Mr. Reyes had several gang related tattoos.

Officer Arrona had seen Ms. Ahamad in the area where the local gang congregated in 2004. Officer Arrona was also familiar with Mr. Reyes from the local gang. Mr. Reyes used a gang moniker. Officer Arrona testified that the activities of the local gang included: murders; robberies; carjacking; vandalism; and narcotics sales. Officer Arrona cited numerous predicate offenses committed by specific local gang members.

The El Pulgarcito restaurant is situated within the local gang territory. When rival gang members are encountered in the local gang's territory, violence is likely to occur. This allows the local gang to assert their authority in the area as well as pursue their criminal activities. When approaching others in their territory, the local gang member usually inquires, "Where are you from?" When posed with a hypothetical situation similar to what occurred in this case, Officer Arrona opined that the gang members worked together to challenge the victims. Moreover, the murder would serve to enhance the reputation of both the individuals and the gang in general within the community. Officer Arrona believed when a gang member removes an automobile from the scene of a crime, they are in effect removing evidence. Efforts to secure money, clothing, and an alternate automobile for an individual involved in a shooting would serve to help not only the gang member but the gang itself.

III. DISCUSSION

A. Ms. Ahamad's Suppression Motion

1. Factual and procedural background

Ms. Ahamad argues that the trial court improperly held that she did not have standing to object to the wiretap evidence. Prior to trial, Ms. Ahamad filed a section 1538.5 motion to suppress her conversations with Mr. Aguilar. The conversations were

intercepted pursuant to a federal court ordered wiretap of Mr. Aguilar's telephone in an unrelated matter.

The basis Ms. Ahamad's suppression motion was that the federal agents failed to comply with "minimization" and "spot monitoring" requirements imposed by title 18 United States Code section 2518(5). Ms. Ahamad's moving papers stated: "The federal order authorizing the electronic surveillance was subject to the process of 'minimization.' It was required that 'all monitoring of wire communications shall be in accordance with the minimization requirement of 18 USC § 2518(5). However, even if a conversation is minimized, 'spot' monitoring may be conducted to ascertain whether or not the conversation has become criminal in nature or is no longer privileged." Later, Ms. Ahamad's moving papers asserted: "In the present investigation, virtually all the calls reported by the federal agents to be involved in the killing . . . were personal telephone calls in which matters not related to drug trafficking were discussed. One reads the conversations and it is difficult to imagine that in the course of an investigation involving a large drug trafficking organization . . . that one could not realize that [Mr. Aguilar] and Ms. Ahamad] were discussing events totally unrelated to drug sales. . . . Yet, the government continued to listen, minimizing very little, if any, of the calls which clearly had nothing to do with drug transactions." We will discuss the substance of the minimization and spot monitoring requirements imposed by federal law in detail later in this opinion.

At the hearing on the motion, H. Clay Jacke, II, Ms. Ahamad's attorney, argued that she did not have to be a target of the wiretap to have standing to object to the use of the conversations as evidence against her. The trial court agreed with the prosecutor's argument that because the wiretap of Mr. Aguilar's cellular phone was federally authorized, California authority does not apply. The trial court noted that although it was willing to go forward as to Mr. Aguilar's suppression motion: "I think Ms. Ahamad is in a very, very different scenario. She is not a target. There is no claim of ownership of the phone. There is no claim of possession of the interests of the phone. Her voice simply

seems to be captured. And that, even in a conservative approach, is a very different situation than Mr. Aguilar. [¶] [The prosecutor] may argue they are exactly the same. He may be correct, but I see a distinction. And at least as far as Ms. Ahamad is concerned, unless and until Ms. Ahamad, through competent evidence, can show she has requisite legitimate expectation of privacy, the court is not prepared to go to merits as to so-called necessity and other factors, minimization as to Ms. Ahamad." After a lengthy recess to allow Mr. Jacke to conduct further research and argument on the issue, the trial court held: "I sustain the People's position. I believe that Ms. Ahamad has not established her threshold of legitimate expectation of privacy in any of the conversations in any of the tapes, and any phone that is involved and, therefore, is not in a position to be going forward. So the court denies to Ms. Ahamad the 1538.5 [motion]." Mr. Aguilar then withdrew his section 1538.5 motion.

2. The trial court's erroneous standing ruling does not require a reversal and assumption of the suppression of evidence hearing

Our Supreme Court explained in *People v. Woods* (1999) 21 Cal.4th 668, 673: "As the finder of fact in a proceeding to suppress evidence (Pen. Code, § 1538.5), the superior court is vested with the power to judge the credibility of the witnesses, resolve any conflicts in the testimony, weigh the evidence and draw factual inferences in deciding whether a search is constitutionally unreasonable. (*People v. Lawler* (1973) 9 Cal.3d 156, 160.) Accordingly, in reviewing the instant suppression order, we consider the record in the light most favorable to [respondents] since 'all factual conflicts must be resolved in the manner most favorable to the [superior] court's disposition on the [suppression] motion.' (*People v. Martin* (1973) 9 Cal.3d 687, 692.) But while we defer to the superior court's express and implied factual findings if they are supported by substantial evidence, we exercise our independent judgment in determining the legality of the search based on the facts so found. (*People v. Glaser* (1995) 11 Cal.4th 354, 362; *People v. Lawler, supra,* 9 Cal.3d at p. 160.)" (See also *People v. Roybal* (1998) 19

Cal.4th 481, 506-507; *People v. Williams* (1988) 45 Cal.3d 1268, 1301; *People v. Siripongs* (1988) 45 Cal.3d 548, 567.)

Title III of the federal Omnibus Crime Control and Safe Streets Act provides a "comprehensive scheme" for the regulation of wiretapping. (*Gelbard v. United States* (1972) 408 U.S. 41, 46; *People v. Leon* (2007) 40 Cal.4th 376, 384.) Because the wiretap authorization was issued by a federal court, we analyze the suppression of evidence issue by reference to a substantive federal law. It is unlawful for anyone to intercept or attempt to intercept any wire, oral, or electronic communication "[e]xcept as otherwise specifically" permitted by other provisions of the statute. (18 U.S.C. § 2511(1)(a).) Our Supreme Court has expressly addressed the issue of whether a person whose conversations are intercepted pursuant to a wiretap order issued by a federal court may litigate a section 1538.5 suppression of evidence motion in state court: "The [Omnibus Crime Control and Safe Streets] Act also provides the means for invoking the suppression sanction. 'Any aggrieved person in any trial, hearing, or proceeding in or before any court . . . of the United States, a State or a political subdivision thereof, may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that—[¶] (i) the communication was unlawfully intercepted . . . .' (18 U.S.C. § 2518(10)(a).) The Act defines an 'aggrieved person' as one 'who was a party to any intercepted wire, oral or electronic communication or a person against whom the interception was directed.' (18 U.S.C. § 2510(11).) [¶] As parties to the taped conversations, both defendants here clearly meet the statutory definition of 'aggrieved person.' Therefore, defendants had standing to move for suppression pursuant to 18 United States Code section 2518(10)." (*People v. Otto* (1992) 2 Cal.4th 1088, 1098; see *Bunnell v. Superior Court* (1994) 21 Cal.App.4th 1811, 1818.) Title 18 United States Code section 2518(10)(a)(i) and (iii)[2]

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[2] Title 18 United States Code section 2518(10)(a)(i) and (iii) state in part: "Any aggrieved person in any trial, hearing, or proceeding in or before any court . . . may move

permit an aggrieved person to move to suppress the contents of an intercepted communication on the grounds it was unlawfully intercepted or the eavesdropping was not conducted in conformity with the federal court's orders. The Attorney General concedes that Ms. Ahamad, as a participant in the intercepted conversations, may move to suppress them.

As noted, Ms. Ahamad contends that the federal agents failed to comply with the minimization and spot monitoring requirements imposed by title 18 United States Code section 2518(5) which states in part: "Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days. In the event the intercepted communication is in a code or foreign language, and an expert in that foreign language or code is not reasonably available during the interception period, minimization may be accomplished as soon as practicable after such interception." Spot monitoring is a component of the statutorily mandated minimization duty imposed by title 18 United States Code section 2518(5) and routinely appears in federal electronic interception authorizations. Spot monitoring occurs during the interception of a nonpertinent conversation. The listener is permitted to renew listening of a nonpertinent conversation; i.e. spot-monitor, in order to determine if its character has changed. (See *United States v. Ramirez* (10th Cir. 2007) 479 F.3d 1229, 1235 & fn. 2 overruled on another point in *Garrison v. Ortiz* (10th Cir. 2008) 296 Fed. Appx. 724, 726; *United States v. Mesa-Rincon* (10th Cir. 1990) 911 F.2d 1433, 1441-1442.)

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to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that--[¶] (i) the communication was unlawfully intercepted [¶] . . . or [¶] (iii) the interception was not made in conformity with the order of authorization or approval."

The United States Supreme Court has explained the minimization requirement does not forbid the interception of conversations unrelated to the specific reason the warrant was issued. Rather, title 18 United States Code section 2518(5) requires the surveillance be conducted in such a manner as to "minimize" the interception of such conversations. (*Scott v. United States* (1978) 436 U.S. 128, 140; *United States v. Hull* (3rd Cir. 2006) 456 F.3d 133, 142-143.) The Supreme Court in *Scott v. United States, supra,* 438 U.S. at page 140 explained: "The statute does not forbid the interception of all nonrelevant conversations, but rather instructs the agents to conduct the surveillance in such a manner as to 'minimize' the interception of such conversations. Whether the agents have in fact conducted the wiretap in such a manner will depend on the facts and circumstances of each case." (Accord *United States v. Hull*, *supra*, 456 F.3d at p. 142) As in other areas of privacy analysis, the controlling question is whether the intercepting authorities acted reasonably. (*Scott v. United States, supra*, 436 U.S. at p. 137; *United States v. Hull*, *supra*, 456 F.3d at p. 142.)

A court reviews a variety of factors in determining whether the authorities minimized the interception of communications unrelated to the justification for the issuance of the warrant. For example, where there is uncertainty as to the scope of the conspiracy, depending on the circumstances, more extensive surveillance may be reasonable. When the conspiracy is vaster, more intensive interception may be reasonable. Also, less adherence to minimization requirements is required in the case of conversations between co-conspirators. If a public telephone is tapped, doubts as to compliance with minimization restrictions may arise if every call is listened in on by the authorities. Additionally, when the interception is occurring at the outset of the authorized surveillance period, it conceivably may be reasonable to listen in on every communication. Later in the surveillance, there may be categories of calls which are unrelated to the investigation and, consistent with the minimization requirement, should not be listened in on by the authorities. On the other hand, there may be circumstances where no nonpertinent patterns of calls arise and it may be reasonable to listen in on

every telephone conversation. Further, in the cases of telephone calls made in code, where the conspirators begin to use aliases, or where ambiguous language is used, law enforcement officials may reasonably reduce their efforts at minimization. (*Scott v. United States, supra,* 436 U.S. at pp. 140-141; *In re Terrorist Bombings, US Embassies, E. Africa* (2nd Cir. 2008) 552 F.3d 157, 176; *United States v. Fernandez* (9th Cir. 2008) 526 F.3d 1247, 1251-1252; *In re Sealed Case* (For.Intel.Surv.Rev. 2002) 310 F.3d 717, 741.) In conducting judicial review, some federal courts refuse to even consider a call which lasts less than two minutes in ruling on a minimization claim by the accused. This is because an intercepting agent cannot reasonably be expected to determine whether the call is nonpertinent in such a short time period. (*United States v. Yarbrough* (10th Cir. 2008) 527 F.3d 1092, 1098; *United States v. Dumes* (7th Cir. 2002) 313 F.3d 372, 380.)

Under federal law, the burden of demonstrating compliance with the minimization restriction is on the prosecution. (*United States v. Torres* (9th Cir. 1990) 908 F.2d 1417, 1423; *United States v. Rizzo* (2nd Cir. 1974) 491 F.2d 215, 217, fn. 7 ["The United States Attorney must be prepared to sustain that burden even in a case where the defense is unprepared or chooses not to present its own evidence on the issue."].) The Tenth Circuit has developed the following burden shifting process for adjudicating minimization claims. The initial burden rests with the government to show reasonable minimization efforts occurred by considering the factors discussed in *Scott v. United States, supra,* 436 U.S. at pages 140-141. (*United States v. Yarbrough, supra,* 527 F.3d at p. 1098; *United States v. Willis* (10th Cir. 1989) 890 F.2d 1099, 1102.) The burden then shifts to the defendant to show more effective minimization could have taken place; i.e., the authorities acted unreasonably. (*Ibid.*; *United States v. Armocida* (3rd Cir. 1975) 515 F.2d 29, 45.)

In this case, no initial minimization showing was made by the prosecution as the trial court ruled Ms. Ahamad had no standing to proceed. And Mr. Aguilar then withdrew his suppression of evidence motion. Thus, the prosecutor presented no evidence on the minimization issue. Typically, unless there is a harmless error question,

an erroneous standing ruling requires the judgment be reversed and the suppression of evidence hearing be resumed. (*People v. Brooks* (1980) 26 Cal.3d 471, 483; *People v. Dachino* (2003) 111 Cal.App.4th 1429, 1433.)

However, we conclude Ms. Ahamad is not entitled to a reversal and resumption of the suppression of evidence hearing because her sole asserted ground—there was a minimization violation—has no merit. The sole ground asserted in Ms. Ahamad's section 1538.5 motion points and authorities was that the intercepted conversations had nothing to do with the initial justification for issuance of the wiretap warrant, a federal drug trafficking investigation. She reasoned the intercepted conversations involved the killing of Mr. Larrainzar and were entirely unrelated to the drug trafficking investigation. This contention has no merit as matter of law.

Title 18 United States Code section 2517(5)[3] expressly permits federal law enforcement officials to disclose the contents of intercepted communications involving offenses other than those specified in the federal judge's authorization or approval. (*United States v. London* (1st Cir. 1995) 66 F.3d 1227, 1234-1235; *In re Grand Jury Subpoena Served On Doe* (2d. Cir. 1989) 889 F.2d 384, 387; *United States v. Angiulo* (1st Cir. 1988) 847 F.2d 956, 980.) An Eleventh Circuit Court of Appeals panel has explained: "Congress adopted section 2517(5) because it 'wished to assure that the

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[3] Title 18 United States Code section 2517(5) states: "When an investigative or law enforcement officer, while engaged in intercepting wire, oral, or electronic communications in the manner authorized herein, intercepts wire, oral, or electronic communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter [18 USCS §§ 2510 et seq.] Such application shall be made as soon as practicable."

Government does not secure a wiretap authorization order to investigate one offense as a subterfuge to acquire evidence of a different offense for which the prerequisites to an authorization order are lacking.' *United States v. Campagnuolo* (5th Cir. 1977) 556 F.2d 1209, 1214 (5th Cir. 1977)." (*United States v. Van Horn* (11th Cir. 1986) 789 F.2d 1492, 1503.) Ms. Ahamad never sought a hearing based on the claim federal law enforcement authorities utilized the drug trafficking warrant as a stratagem to discover evidence relating to the shooting of Mr. Larrainzar. Nor did Ms. Ahamad challenge the federal court disclosure orders which resulted in the Los Angeles homicide detectives learning of the ongoing federally authorized electronic surveillance.

As a result, Ms. Ahamad is not entitled to a resumed hearing on her minimization claims. Ms. Ahamad's sole argument in her suppression of evidence motion points and authorities was that since the challenged conversations clearly did not involve drug trafficking, they could not be intercepted and disclosed and they should therefore be suppressed. As noted, title 18 United States Code section 2517(5) provides otherwise. Thus, Ms. Ahamad failed to raise a concrete litigable issue in her moving papers concerning other aspects of the minimization obligation imposed by title 18 United States Code section 2518(5). And she is not now entitled to a reversal and resumed section 1538.5 hearing notwithstanding the trial court's incorrect ruling on the standing issue. (*United States v. Migely* (1st. Cir. 1979) 596 F.2d 511, 513; *Cohen v. United States* (9th Cir. 1967) 378 F.2d 751, 761.) A motion to suppress must be supported by points and authorities which set forth the factual basis and legal authorities which require suppression of the evidence. (§ 1538.5, subd. (a)(2) ["A motion pursuant to paragraph (1) shall be made in writing and accompanied by a memorandum of points and authorities . . . [which] shall set forth the factual basis and the legal authorities that demonstrate why the motion should be granted."]; *People v. Williams* (1999) 20 Cal.4th 119, 135.) Our Supreme Court has held that a defendant must specify in the moving papers the precise grounds for the suppression of evidence motion. (*Ibid*.; *People v.*

Smith (2002) 95 Cal.App.4th 283, 295-296.) Ms. Ahamad's papers raised no issues concerning other potential minimization violations.

Finally, Ms. Ahamad argues there was a violation of the spot monitoring limitations in the federal court order. However, Ms. Ahamad's spot monitoring assertion in the trial court was the same as her minimization contention. According to Ms. Ahamad's moving papers, after the authorities heard about the killing of Mr. Larrainzar, spot monitoring restrictions were disregarded. However, as noted, title 18 United States Code section 2517(5) authorizes interception and disclosure of intercepted conversations concerning other crimes. Thus, no further hearing is warranted.

[Part III(B)-(E) are deleted from publication.

See post at page 37, where publication is to resume.]

B. Severance Motion

1. Procedural background

Prior to trial, the prosecutor moved that Mr. Reyes, Mr. Aguilar, and Ms. Ahamad be tried together. Mr. Reyes filed an opposition to the consolidation motion and moved that he be tried separately. Mr. Reyes also objected to the admission of certain wiretap evidence. The challenged wiretap evidence consisted of certain statements by Mr. Aguilar and Ms. Ahamad concerning Mr. Reyes' participation in the homicide. The prosecutor's consolidation motion was granted. Mr. Reyes' severance motion was denied.

Mr. Reyes's oral severance motions on January 3 and 22, 2007 were denied based upon Mr. Aguilar's medical condition that necessitated the trial's continuance. On April 19, 2007, the issue of severance was again raised just prior to the commencement of trial. The trial court reviewed the transcripts of the telephone conversations between Mr. Aguilar and Ms. Ahamad at length with counsel and redacted any reference to Mr. Reyes. The trial court ruled: "There is a motion regarding statements in this case. There are actually several motions filed, one was for a severance that was denied as to these two defendants. But many of the same issues were raised in that motion that are being raised

here." The trial court ruled the transcripts would be limited to Ms. Ahamad and no argument would be permitted which referenced Mr. Reyes and the contents of the phone calls.

2. The prosecutor's joinder motion could be properly granted

In *People v. Lewis* (2008) 43 Cal.4th 415, 452, our Supreme Court held: "Our Legislature has expressed a preference for joint trials. [Citation.] Section 1098 provides in pertinent part: 'When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order[s] separate trials.' The court may, in its discretion, order separate trials if, among other reasons, there is an incriminating confession by one defendant that implicates a codefendant, or if the defendants will present conflicting defenses. [Citations.]" (Citing *People v. Avila* (2006) 38 Cal.4th 491, 574-575; *People v. Massie* (1967) 66 Cal.2d 899, 917.) Section 954 provides in pertinent part: "An accusatory pleading may charge . . . two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated. . . . provided that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately . . . ."

The California Supreme Court has held: "'"'The burden is on the party seeking severance to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried.' [Citation.] [¶] . . . Refusal to sever may be an abuse of discretion where: (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a 'weak' case has been joined with a 'strong' case, or with another 'weak' case, so that the 'spillover' effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case."' [Citation.]" (*People v. Gutierrrez* (2002) 28 Cal.4th 1083, 1120, quoting *People v. Bradford* (1997) 15 Cal.4th 1229, 1315; *People v. Ochoa* (2001) 26 Cal.4th 398, 423.) We review the severance and consolidation ruling for abuse of discretion. (*People v.*

Lewis, supra, 43 Cal.4th at p. 452; *People v. Gutierrez, supra,* 28 Cal.4th at p. 1120; *People v. Ochoa, supra,* 26 Cal.4th at p. 423; *People v. Cunningham* (2001) 25 Cal.4th 926, 984-985; *People v. Alvarez* (1996) 14 Cal. 4th 155, 188.) In *Lewis*, our Supreme Court further held: "If we conclude the trial court abused its discretion, reversal is required only if it is reasonably probable that the defendant would have obtained a more favorable result at a separate trial. [Citations.]" (*People v. Lewis, supra,* 43 Cal.4th at p. 452, citing *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 40; *People v. Keenan* (1988) 46 Cal.3d 478, 503.)

Mr. Reyes argues he was entitled to a separate trial because the wiretapped conversations, to which he was not party, were inadmissible against him. Citing *Crawford v. Washington* (2004) 541 U.S. 36, 59, *Davis v. Washington* (2006) 547 U.S. 813, 821-824, *Bruton v. United States* (1968) 391 U.S. 123, 128-134, and *People v. Cage* (2007) 40 Cal. 4th 965, 984, Mr. Reyes argues Mr. Aguilar's conversations were testimonial in nature. Mr. Reyes reasons as follows. Mr. Aguilar was arrested. Upon being released, the police returned Mr. Aguilar's cellular phone in an effort to intercept future conversations regarding the homicide. Mr. Reyes contends this would inculpate him and deny him his constitutional right to confront witnesses. We agree with the Attorney General the comprehensive redaction of the wiretap evidence eliminated any risk of a confrontation clause violation.

Where an extrajudicial statement of an accomplice implicates a defendant, the United States Supreme Court has held that a confrontation clause violation may be avoided by proper redaction. The defendant's name must be removed from the extrajudicial statement as well as any reference to the accused's existence. (*Richardson v. Marsh* (1987) 481 U.S. 200, 208-211; see also *Gray v. Maryland* (1998) 523 U.S. 185, 197; *People v. Fletcher* (1996) 13 Cal.4th 451, 456; *People v. Archer* (2000) 82 Cal.App.4th 1380, 1388.) In this case, no abuse of discretion occurred when a joint trial was ordered. Any references to Mr. Reyes were removed from the wiretapped conversations between Mr. Aguilar and Ms. Ahamad. The prosecutor was ordered not to

refer to Mr. Reyes in the context of the wiretapped conversations. In addition, the jury was admonished the recorded conversations were admissible only as to Ms. Ahamad. Our Supreme Court has consistently stated that on appeal: "'"Jurors are presumed to be intelligent, capable of understanding instructions and applying them to the facts of the case."' [Citations.]" (*People v. Carey* (2007) 41 Cal.4th 109, 130, quoting *People v. Lewis* (2001) 26 Cal.4th 334, 390; *People v. Yeoman* (2003) 31 Cal.4th 93, 139.) Moreover, the recorded statements to which Mr. Reyes objects were made prior to Mr. Aguilar's arrest. Therefore, his argument that the return of the cellular telephone to Mr. Aguilar by the police in order to obtain additional information amounted to interrogation is meritless.

In addition, Mr. Reyes's presence at the scene of the murder was established through independent eyewitnesses and the victims who identified him from photographic lineups and at trial. Furthermore, Ms. Valdez, Mr. Sandt, and Ms. Weld, placed Mr. Reyes at the scene. The evidence as to both Mr. Reyes and Ms. Ahamad, while distinguishable, arose out of the same incident. A reasonable judge could find the evidence was cross-admissible if two separate trials had been conducted and there was no substantial danger of prejudice to either defendant as a result of the joinder. Any error in admitting the redacted wiretap conversations was harmless beyond a reasonable doubt based on other overwhelming evidence of Mr. Reyes's guilt. (*Chapman v. California* (1967) 386 U.S. 18, 22; *People v. Lewis, supra,* 43 Cal.4th at pp. 461-468; *People v. Anderson* (1987) 43 Cal.3d 1104, 1129.)

C. Gang Evidence

Mr. Reyes argues that the trial court improperly allowed two gang investigators to testify and admitted opinion evidence of mental state. Mr. Reyes argues that although some gang evidence was admissible, the testimony actually presented was unduly prejudicial and cumulative. Our Supreme Court has held: "'Trial courts exercise discretion in determining both the admissibility of evidence under Evidence Code section 352 [citation] and a witness's expert status [citation].' [Citation.]" (*People v. Gonzalez*

(2006) 38 Cal.4th 932, 944.) In *People v. Gardeley* (1996) 14 Cal.4th 605, 617, our Supreme Court held Evidence Code section 801[4] permitted a trial court to admit testimony concerning "the culture and habits" of criminal street gangs. (See also *People v. Gonzalez, supra,* 38 Cal.4th at p. 944; *People v. Champion* (1995) 9 Cal.4th 879, 919-922; *People v. Killebrew* (2002) 103 Cal.App.4th 644, 653; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1370; *People v. Gamez* (1991) 235 Cal.App.3d 957, 965-966, overruled in part in *People v. Gardeley, supra,* 14 Cal.4th 605, 624.) We review the trial court's admission of gang evidence for abuse of discretion. (*People v. Gonzalez, supra,* 38 Cal.4th at p. 944; *People v. Carter* (2003) 30 Cal.4th 1166, 1194.)

In *People v. Ward* (2005) 36 Cal.4th 186, 210, our Supreme Court found that the content of the opinions introduced in that trial involved gang culture and habit evidence approved in *Gardeley*: "The substance of the experts' testimony, as given through their responses to hypothetical questions, related to defendant's motivation for entering rival gang territory and his likely reaction to language or actions he perceived as gang challenges. [Citations.] This testimony was not tantamount to expressing an opinion as to defendant's guilt. [Citation.]" The same was true in this case. The trial court could reasonably admit the testimony of both Lieutenant Zarcone and Officer Arrona so the jurors had a complete understanding of the local gang's past and present operations as they involved Mr. Reyes and Ms. Ahamad. Also, the prosecution charged defendants with a section 186.22 gang allegation. The prosecutor therefore had an obligation to present evidence to support that allegation.

Lieutenant Zarcone testified briefly regarding the background of the local gang. Lieutenant Zarcone was assigned to monitor the local gang during the 1990's. Lieutenant

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[4] Evidence Code section 801 provides in relevant part: "If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is: [¶] (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact . . ."

Zarcone made numerous arrests of local gang members. Lieutenant Zarcone knew Mr. Reyes to be a member of the local gang who used a specific gang moniker. Lieutenant Zarcone also knew Mr. Reyes's four brothers were all members of the local gang. Lieutenant Zarcone also testified that Mr. Reyes's girlfriend, Ms. Aguilar, is Mr. Aguilar's sister. Ms. Ahamad was also a member of the local gang. Ms. Ahamad lived with Mr. Aguilar. Mr. Aguilar also used a gang alias. Officer Arrona testified that he had been assigned to the gang unit for four and one-half years at the time of trial and had grown up in an area known for gangs. Officer Arrona was familiar with the local gang hangouts, rivalries, tattoos, graffiti, and vandalism. Officer Arrona testified both Ms. Ahamad and Mr. Reyes had several gang related tattoos. Officer Arrona had seen Ms. Ahamad in the area where the local gang congregated in 2004. Officer Arrona was also familiar with Mr. Reyes from the local gang. Mr. Reyes was known within the gang by an alias name. Officer Arrona testified that the activities of the local gang included: murders; robberies; carjackings; vandalism; and narcotics sales. Officer Arrona cited numerous predicate offenses committed by specific local gang members. Officer Arrona was aware that the El Pulgarcito restaurant is situated within the local gang territory. When rival gang members are encountered in their territory, violence is a likely byproduct. This allows the local gang to assert their authority in the area as well as pursue their criminal activities. When approaching others in their territory, the local gang member usually inquires, "Where are you from?" When posed with a hypothetical situation similar to what occurred in this case, Officer Arrona testified gang members worked together to challenge the victims. Moreover, the murder would serve to enhance the reputation of both the individuals and the gang in general within the community. Officer Arrona testified the removal of an automobile from a crime scene and efforts to secure money, clothing, and an alternate automobile for an individual involved in a shooting would serve to help not only the gang member but the gang itself.

No doubt, a gang investigator is prohibited from offering an opinion of the knowledge or intent of a defendant on trial. But such a witness may answer hypothetical

questions based on other evidence presented by the prosecution. (*People v. Gonzalez, supra,* 38 Cal.4th at p. 946; *People v. Gardeley, supra,* 14 Cal.4th at p. 618; see also *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1551, fn. 4.) Officer Arrona's testimony was not tantamount to expressing an opinion as to Mr. Reyes's guilt. (*People v. Gonzalez, supra,* 38 Cal.4th at pp. 944-947; *People v. Ward, supra,* 36 Cal.4th at p. 210.) In addition, the jurors were instructed on how to determine what weight to give to the investigators' testimony as well as the hypothetical questions posed to them. It is presumed the instructions were obeyed. (*People v. Guerra* (2009) 37 Cal.4th 1067, 1115 overruled on another point in *People v. Rundle* (2008) 43 Cal.4th 76,151; *People v. Anderson* (1987) 43 Cal.3d 1104, 1120.)

D. Substantial Evidence Supported Defendants' Convictions

1. Overview

Defendants argue there was insufficient evidence to support their convictions. Mr. Reyes argues that: the two eyewitnesses were not credible; there was insufficient evidence he aided and abetted the murder and the prosecutor did not establish culpability under the natural and probable consequences theory. Ms. Ahamad argues there was insufficient evidence to support the gang enhancement. In reviewing a challenge of the sufficiency of the evidence, we apply the following standard of review: "[We] consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment. The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt. [Citations.]" *People v. Mincey* (1992) 2 Cal.4th 408, 432, fn. omitted; *People v. Carter* (2005) 36 Cal.4th 1114, 1156; *People v. Hayes* (1990) 52 Cal.3d 577, 631; *People v. Johnson* (1980) 26 Cal.3d 557, 576.) The standard of review is the same in cases where the prosecution relies primarily on circumstantial evidence. (*People v. Valdez* (2004) 32 Cal.4th 73, 104; *People v. Rodriguez* (1999) 20 Cal.4th 1, 11; *People v. Stanley* (1995) 10 Cal.4th 764, 792; *People v. Bloom* (1989) 48 Cal.3d 1194, 1208; *People v. Bean* (1988) 46 Cal.3d 919, 932.) Our sole function is to

determine if *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Jackson v. Virginia, supra,* 443 U.S. at p. 319; *People v. Bolin* (1998) 18 Cal.4th 297, 331; *People v. Marshall* (1997) 15 Cal.4th 1, 34; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) The California Supreme Court has held, "Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]. [Citation.]'" (*People v. Bolin, supra,* 18 Cal.4th at p. 331, quoting *People v. Redmond* (1969) 71 Cal.2d 745, 755.)

2. Mr. Reyes's murder conviction

In this case, the jury heard the testimony of Mr. Martinez and Mr. Chester, who were eyewitnesses to the murder of Mr. Larrainzar. Mr. Martinez had been confronted in the bathroom of the restaurant by a Latino man. Mr. Martinez was asked where he was from. Soon thereafter, Mr. Martinez was confronted by another Latino individual in the hallway. Mr. Martinez was asked to which barrio he belonged and threatened with death if he refused to answer. Mr. Chester saw Mr. Reyes at the adjacent table. Mr. Reyes angrily looked at Mr. Chester more than seven times. Mr. Chester joined Mr. Martinez to see what was happening. Mr. Chester was confronted by one of the men who said, "What barrio, what hood are you from?" Mr. Chester responded, "From none." Thereupon, Mr. Chester was punched in the face. Mr. Chester fell down some stairs. Mr. Martinez was held by one of the men. Mr. Martinez was then struck in the head. Mr. Martinez and Mr. Chester heard a gunshot. Their assailants ran over Mr. Chester and out of the restaurant. Mr. Martinez and Mr. Chester saw that Mr. Larrainzar had been shot in the head. Mr. Martinez was shown a photographic lineup by Detective Mota. Mr. Martinez selected Mr. Aguilar as looking like the first individual involved in the gang related challenge in the bathroom. Mr. Martinez was shown another photographic lineup some time later. Mr. Martinez identified Mr. Reyes as the individual who made the second gang related challenge. Mr. Martinez also identified Mr. Reyes at trial. Mr. Martinez was 90 percent certain about his identification.

Mr. Chester was also interviewed by Detective Mota. When shown a photographic lineup, Mr. Chester selected Mr. Aguilar. Mr. Chester was 90 percent certain about this identification. Mr. Chester was shown another photographic lineup on June 10, 2004. Mr. Chester identified Mr. Reyes as one of the assailants. Mr. Reyes was staring at Mr. Chester just prior to the shooting. Also, Mr. Reyes was giving Mr. Chester "dirty looks".

To the authorities, Ms. Weld denied knowing the men who assaulted Mr. Chester and Mr. Martinez and shot Mr. Larrainzar. But Ms. Weld told the restaurant owner the individuals were the local gang members who had been causing trouble in the restaurant in recent weeks. Ms. Weld told Ms. Valdez that the men were known by their gang monikers. Ms. Weld, using Mr. Reyes' gang alias, told Ms. Valdez, the restaurant owner, he lived directly across the street. When Ms. Valdez was later interviewed Detective Mota, she indicated she was afraid to give information because she had been intimidated. However, she wrote down on a piece of paper the gang monikers of Mr. Reyes and Mr. Aguilar. Ms. Valdez passed the piece of paper to Detective Mota on the counter and then took it back and crumpled it. Ms. Valdez said she would not look at photographic lineups containing defendants' photos. However, when Detective Mota placed them on the counter, she pointed at Mr. Reyes' photograph.

Mr. Sandt, who lived behind the El Pulgarcito restaurant in his car, spoke to Detective Pere about the incident. Detective Pere wrote down the information provided by Mr. Sandt. Mr. Sandt read and signed the statement. Mr. Sandt gave Detective Pere the gang monikers of Mr. Reyes and Mr. Aguilar regarding the murder. Mr. Sandt said one of the gang members drove a white sport utility truck which frequented the area of 7th and Alvarado. Defendant's white Chevrolet Tahoe was parked across the street from the restaurant after the shooting. At trial, Mr. Sandt recalled giving Mr. Aguilar's gang moniker to Detective Pere. However, at trial, Mr. Sandt did not recall Mr. Reyes' gang alias. But Mr. Reyes' gang moniker appeared on the piece of paper Mr. Sandt signed for Detective Pere. Mr. Sandt identified Mr. Aguilar and Mr. Reyes from photographic

lineups and correctly identified the gang aliases. Mr. Sandt, Ms. Valdez, and Ms. Weld had all been intimidated and were reluctant to testify. The jurors had the opportunity to assess the witnesses' demeanor and credibility.

The jury was instructed regarding: reasonable doubt; eyewitness testimony; the believability of a witness; discrepancies in a witness's testimony; discrepancies between different witness testimony; inconsistent statements of a witness; a witness who willingly testifies falsely; the fact that a witness has been convicted of a felony; the weight of a single witness's testimony; and the sufficiency of circumstantial evidence. Our Supreme Court has consistently stated that on appeal: "'"Jurors are presumed to be intelligent, capable of understanding instructions and applying them to the facts of the case."' [Citation.]" (*People v. Carey, supra,* 41 Cal.4th at p. 130; *People v. Bradford* (1997) 15 Cal.4th 1229, 1337; see *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 803.) Based upon the evidence presented, the jury could reasonably determine that Mr. Reyes was not only present at the scene, but, as will be set forth below, also aided and abetted Mr. Larrainzar's murder.

Mr. Reyes further argues that the trial court improperly denied his new trial motion based on insufficient evidence. As to the new trial motion, we also review the ruling for abuse of discretion. (*People v. Hovarter* (2008) 44 Cal.4th 983, 999, fn. 4; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1252.) In denying the new trial motion the trial court held: "I will tell you I heard this case. And this is a case clearly where the jury could have gone either way. There was testimony by Miss Ahamad, if it was believed, that Mr. Reyes didn't know what Mr. Aguilar was going to do, that he was surprised. And at a later meeting they had said, 'Why did you do this?' But Mr. Bernstein argued that the jury should disregard that testimony and that Miss Ahamad was a liar because Miss Ahamad's testimony also placed Mr. Reyes at the scene. So it was argued that she shouldn't be believed. [¶] And I assume, from the verdict, that the jury heard all of the testimony and decided that they believed Mr. Reyes was there and involved with Mr. Aguilar as [the prosecutor] has ably argued. So the motion for a new

trial is denied. I think there was sufficient evidence to support the verdict. And, again, I think the case could have gone either way based on the evidence that was presented." As set forth above, we agree with the trial court's finding that there was sufficient evidence to support the verdict. No abuse of discretion occurred when the new trial motion was decided.

3. Substantial evidence supports the finding that Mr. Reyes aided and abetted the murder

Mr. Reyes argues that there was insufficient evidence that Mr. Larrainzar's death was the natural and probable consequence of acts that he knowingly aided and abetted. We disagree. Section 31 provides in pertinent part, "All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission . . . are principals in any crime so committed." Our Supreme Court has discussed the mental state necessary for liability as an aider and abettor: "To prove that a defendant is an accomplice . . . the prosecution must show that the defendant acted 'with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.' [Citation.] When the offense charged is a specific intent crime, the accomplice must 'share the specific intent of the perpetrator'; this occurs when the accomplice 'knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime.' [Citation.] Thus, we held, an aider and abettor is a person who, 'acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime.' [Citation.]" (*People v. Prettyman* (1996) 14 Cal.4th 248, 259, original italics, quoting *People v. Beeman* (1984) 35 Cal.3d 547, 560-561; see also *People v. Mendoza* (1998) 18 Cal.4th 1114, 1122-1123 ["The jury must

find ‘the intent to encourage and bring about conduct that is criminal, not the specific intent that is an element of the target offense . . . .’ [Citations.]”]

Our Supreme Court also held: “Once the necessary mental state is established, the aider and abettor is guilty not only of the intended, or target, offense, but also of any other crime the direct perpetrator actually commits that is a natural and probable consequence of the target offense. [Citation.]” (*People v. Mendoza, supra*, 18 Cal.4th at p. 1123; see also *People v. Cleveland* (2004) 32 Cal.4th 704, 729.) Our Supreme Court has explained the application of the natural and probable consequences rule thusly in the context applicable here: “It is important to bear in mind that an aider and abettor’s liability for criminal conduct is of two kinds. First, an aider and abettor with the necessary mental state is guilty of the intended crime. Second, under the natural and probable consequences doctrine, an aider and abettor is guilty not only of the intended crime, but also ‘for any other offense that was a “natural and probable consequence” of the crime aided and abetted.’ (*People v. Prettyman, supra*, 14 Cal.4th at p. 260.) Thus, for example, if a person aids and abets only an intended assault, but a murder results, that person may be guilty of that murder, even if unintended, if it is a natural and probable consequence of the intended assault. (*Id.* at p. 267.)” (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117.) Moreover, the Court of appeal has held: “The issue ‘is not whether the aider and abettor *actually* foresaw the additional crime, but whether, judged objectively, it was *reasonably* foreseeable.’ [Citation.]” (*People v. Vasco* (2005) 131 Cal.App.4th 137, 161, original italics, citing *People v. Mendoza, supra*, 18 Cal.4th at p. 1133.) Our colleagues in the Court of Appeal for the Fourth Appellate District held: “The question whether an offense is a natural and probable consequence of a target offense is to be determined ‘in light of all of the circumstances surrounding the incident.’ (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 531.)” (*People v. Leon* (2008) 161 Cal.App.4th 149, 158.

In the present case, Mr. Reyes, Ms. Ahamad, and Mr. Aguilar were members of the local gang. Mr. Aguilar confronted Mr. Chester and Mr. Martinez and issued a gang

related challenge demanding they state where they were from. Mr. Reyes then inquired: "Where are you from? If you're not going to tell me, I'm going to kill you." Mr. Reyes joined Mr. Aguilar in physically assaulting both Mr. Chester and Mr. Martinez. The eyewitness testimony and circumstantial evidence suggests that when Mr. Larrainzar came to his companions' aid, he was shot in the head at close range. In addition, Ms. Ahamad testified that Mr. Aguilar told her that he left the restaurant to retrieve a gun after a staring contest. Mr. Aguilar told Ms. Ahamad that during a subsequent physical confrontation, the gun went off accidentally when he hit one of the men with it.

Even if the intended confrontation was assault, murder was a natural and probable consequence of the gang related crime. The foregoing constituted substantial evidence sufficient to hold Mr. Reyes liable for murder on a natural and probable consequences theory. (*People v. Gonzales* (2001) 87 Cal.App.4th 1, 10-11 [murder conviction upheld as to nonshooting defendant under natural and probable consequences theory]; *People v. Montes* (1999) 74 Cal.App.4th 1050, 1056; *People v. Montano* (1979) 96 Cal.App.3d 221, 227 [defendant's liability for aiding and abetting an attempted murder does not depend on his awareness that fellow gang members had deadly weapons in their possession].) In *People v. Montes, supra,* 74 Cal.App.4th at page 1056, our colleagues in the Court of Appeal for the Fourth Appellate District noted: "When rival gangs clash today, verbal taunting can quickly give way to physical violence and gunfire. No one immersed in the gang culture is unaware of these realities, and we see no reason the courts should turn a blind eye to them." (See *People v. Martinez* (2008) 169 Cal.App.4th 199, 230.) Although the present case does not involve an attack on a rival gang, the same principle applies and substantial evidence supports the first degree murder jury verdicts.

4. There was sufficient evidence the murder was committed for the gang's benefit

Ms. Ahamad argues there was insufficient evidence to support the jury's finding that the murder was committed for the benefit of a criminal street gang. At the time the murder occurred, section 186.22 provided in relevant part: "(b)(1) [A]ny person who is

convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished . . . . [¶] . . . [¶] (e) As used in this chapter, 'pattern of criminal gang activity' means the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of the following offenses, provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons: [¶] . . . [¶] (2) Robbery . . . . [¶] (3) Unlawful homicide . . . ." "[T]he 'criminal street gang' component of a gang enhancement requires proof of three essential elements: (1) that there be an 'ongoing' association involving three or more participants, having a 'common name or common identifying sign or symbol'; (2) that the group as one of its 'primary activities' the commission of one or more specified crimes; and (3) the group's members either separately or as a group 'have engaged in a pattern of criminal gang activity.' [Citation.]" (*People v. Vy* (2004) 122 Cal.App.4th 1209, 1222, citing *People v. Gardeley, supra,* 14 Cal.4th at p. 617; see also § 186.22, subd. (f); *In re Alexander L.* (2007) 149 Cal.App.4th 605, 610-611; *People v. Ortiz* (1997) 57 Cal.App.4th 480, 484.) The same standard of review we apply to a substantive charge applies to a claim of insufficiency of the evidence to support a gang enhancement. (*People v. Leon, supra,*161 Cal.App.4th at p. 161; *People v. Vy, supra,* 122 Cal.App.4th at p. 1224; *People v. Ortiz, supra,* 57 Cal.App.4th at p. 484.)

Ms. Ahamad argues: "A reasonable jury, following the court's instructions on the law, could not have rendered a finding of 'true' that [she] did anything at the direction of, or in association with, the [local] gang. She acted, if at all, to benefit the father of her child." Specifically, Ms. Ahamad argues: "[T]he prosecution failed to offer any substantial evidence on section 186.22's separate requirement that her conduct, *in her*

mind was specifically intended to promote, further or assist the gang." (Original italics.) Ms. Ahamad further argues that based upon Detective Arrona's trial testimony "[a] rational jury would have realized that the only 'substantial' evidence of [her] active and contemporary gang membership was remote. She had joined the gang at 11 years of age." Ms. Ahamad testified that she quit the gang some 12 years prior to the shooting.

However, Ms. Ahamad need not have been a member of the gang to assist in criminal the conduct of gang members. (§ 186.22, subd. (b)(1); see *People v. Bautista* (2005) 125 Cal.App.4th 646, 656, fn. 5.) As previously explained, Ms. Ahamad knew the shooting was gang related. During her conversations with Mr. Aguilar she stated as much: "But I'm going to tell you something. Since it was a gang thing they're going to start looking for cholos and you know that Blackie and all those guys are snitches, Raul. All they have to do is say your *nickname* and everything goes to shit." (Original italics.) During the conversations, Ms. Ahamad told Mr. Aguilar she had arranged to have false identification prepared for him. Further, during the conversation, Ms. Ahamad said he had $15,000 in his bank account which she could withdraw for him. Furthermore, Ms. Ahamad and others spoke to Ms. Weld. Ms. Ahamad felt certain Ms. Weld would not talk. Moreover, Ms. Ahamad explained Ms. Weld saw photos of Mr. Reyes. But Ms. Weld did not identify Mr. Reyes. When describing the photographs, Ms. Weld used Mr. Reyes' gang alias. And, Ms. Ahamad promised to bring clean clothes to him. Moreover, there was testimony Ms. Ahamad: had been a member of the local gang; associated with gang members; and had gang tattoos. In addition, Officer Arrona was posed with the hypothetical inquiry where a gang member calls upon a woman for assistance in securing clothing, money, transportation and gaining information about what has transpired in the community. Based upon his experience and training, Officer Arrona believed these activities clearly demonstrated the woman was doing these things at the direction of, for the benefit of, and in association with the criminal street gang. The jury in this case could reasonably find that Ms. Ahamad committed the offense of being an accessory after the fact for the benefit of the criminal street gang. (§ 186.22, subd. (b)(1).)

E. Instructional Error Contention

Mr. Reyes also argues that the trial court improperly instructed the jury on the natural and probable consequences theory of liability pursuant to CALJIC No. 3.02[5] as a basis for the murder verdict and the gang-related firearm enhancement pursuant to CALCRIM No. 1402.[6] These two closely related contentions are without merit. The trial

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[5] The jury was instructed pursuant to CALJIC No. 3.02 as follows: "One who aids and abets another in the commission of a crime is not only guilty of that crime but is also guilty of any other crime committed by a principal which is a natural and probable consequence of the crimes originally aided and abetted. [¶] In order to find the defendant guilty of the crime of murder, as charged in Count One, you must be satisfied beyond a reasonable doubt that: [¶] 1. The crime of assault in violation of [P]enal [C]ode section 240 was committed; [¶] 2. That the defendant aided and abetted that crime; [¶] 3. That a co-principal in that crime committed the crime of murder; and [¶] 4. The crime of murder was a natural and probable consequence of the commission of the crime of [P]enal [C]ode section 240. [¶] In determining whether a consequence is 'natural and probable,' you must apply an objective test, based not on what the defendant actually intended, but on what a person of reasonable and ordinary prudence would have expected likely to occur. The issue is to be decided in light of all of the circumstances surrounding the incident. A 'natural' consequence is one which is within the normal range of outcomes that may be reasonably expected to occur if nothing unusual has intervened. 'Probable' means likely to happen."

[6] The jury was instructed in compliance with CALCRIM No. 1402: "If you find the defendant guilty of the crime charged in Count one and you find that the defendant committed that crimes for the benefit of, at the direction of, or in association with a criminal street gang with the intent to promote, further, or assist in any criminal conduct by gang members, you must then decide whether the People have proved the additional allegation that one of the principals personally and intentionally discharged a firearm during that crime and caused death. You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime. [¶] To prove this allegation, the People must prove that: [¶] 1. Someone who was a principal in the crime personally discharged a firearm during the commission of the crime[]; [¶] AND [¶] 2. That person intended to discharge the firearm; [¶] AND [¶] 3. That person's act

court could reasonably instruct on the natural and probable doctrine pursuant to CALJIC No. 3.02 and the gang-related firearm enhancement pursuant to CALCRIM No. 1402. A trial court is obliged to instruct, even without a request, on the general principles of law which relate to the issues presented by the evidence. (§§ 1093, subd. (f), 1127; *People v. Ledesma* (2006) 39 Cal.4th 641, 715; *People v. Wims* (1995) 10 Cal.4th 293, 303; *People v. Turner* (1990) 50 Cal.3d 668, 690.) Here, the prosecutor relied on the natural and probable consequences theory in closing argument. Hence, the trial court was obligated to instruct on a natural and consequences theory. (*People v. Prettyman*, *supra*, 14 Cal.4th at p. 269; *People v. Huynh* (2002) 99 Cal.App.4th 662, 664, 678.)

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caused the death of another person. [¶] A person is a principal in a crime if he or she directly commits the crime or if he aids and abets someone else who commits the crime. [¶] A firearm is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion. [¶] A principal personally uses a firearm if he intentionally does any of the following: [¶] 1. Displays the firearm in a menacing manner. [¶] 2. Hits someone with the firearm. [¶] OR [¶] 3. Fires the firearm. [¶] An act causes death if the death is the direct, natural, and probable consequence of the act and the death would not have happened without the act. A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence. [¶] There may be more than one cause of death. An act causes death only if it is a substantial factor in causing the death. A substantial factor is more than a trivial or remote factor. However, it does not need to be the only factor that causes the death. [¶] The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved."

[The balance of the opinion is to be published]

IV. DISPOSITION

The judgments are affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

TURNER, P.J.

We concur:

ARMSTRONG, J.

KRIEGLER, J.